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DISCUSSION OF
IMPOSSIBILITY OF PERFORMANCE IN
CONTRACTS FOR ENGINEERING
AND CONSTRUCTION

(Published in October, 1950)

By Samuel I. Sacks, Melvin W. Jackson, George J.
Soffer, Abraham M. Aloff, and Robert F. Borg

CONSTRUCTION DIVISION

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DISCUSSION

SAMUEL I. SACKS,³ M. ASCE.—An outstanding classic, this paper assembles all the important cases and principles under one cover. The work involved must have been tremendous, and Mr. Borg is to be complimented on the result.

However, under the heading, "C. Application of Exceptions: 2. Absolute Impossibility," the author states:

"Should the contractor be given an appreciable degree of discretion as to the methods to be used for performance, then he assumes the risk of the sufficiency of the plans (52).^{3a} Also, when the contractor agrees not only to follow the plans and specifications but also to produce a desired result, he is liable if he follows the plans and specifications (56)."

A reading of the case of Philadelphia Housing Authority versus Turner Construction Company would appear to sustain the principle recited by Mr. Borg, namely,

"* * * when the contractor agrees not only to follow the plans and specifications but also to produce a desired result, he is liable if he follows the plans and specifications (56)."

In the opinion of the writer, the Philadelphia Housing Authority case is a harsh one, but being the law, it must be followed. In that case, the Court held (56a):

"Where a construction contract provided that 'by submitting a bid the bidder agrees that he has examined the site and the specification and drawings and, where the specification requires in any part of the work a given result to be produced, that the specification and drawings are adequate and the required result can be produced under the specification and drawings' and also provided, 'no claim for any extra work will be allowed because of alleged impossibilities in the production of the results specified or because of inadequate or improper plans and specifications and wherever a result is required, the successful bidder shall furnish any and all extras and make any changes needed to produce * * * the required result,' it was held that the contractor could not maintain a claim for the extra cost he was put to by the necessity of using another kind of material than that mentioned in the specification in order to produce the required result. (514-16)"

MELVIN W. JACKSON,⁴ Assoc. M. ASCE.—According to the civil code of one state

"It is essential to the existence of a contract that there should be: (1) Parties capable of contracting, (2) Their consent, (3) A lawful object, and (4) A sufficient consideration." (Civil Code of California)

Impossibility of performance is just one aspect of the third requirement of a valid contract. Regarding impossibility, this code states,

"The object of a contract must be possible and ascertainable by the time the contract is to be performed. Everything is deemed possible except that

NOTE.—This paper by Robert F. Borg was published in October, 1950, as *Proceedings-Separate No. 36*. The numbering of footnotes in this Separate is a continuation of the consecutive numbering used in the original paper.

³ Attorney-at-Law and Cons. Civ. Engr., Sacks & Piwosky, Philadelphia, Pa.

^{3a} For reference to numerals in parentheses, see *Court Citations and References* at the end of this discussion separate.

⁴ Asst. Prof. of Civ. Eng., Univ. of Colorado, Boulder, Colo.

which is impossible in the nature of things. Where a contract with a single object is wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void."

Wherein, then, lies the difficulty in defining "impossibility"?

The study of impossibility by the author has represented a tremendous amount of work and study. It is a perfect lesson on the impossibility of defining "impossibility" exactly, a term which involves a wide range of legal and social relationships with an almost infinite number of mutations and permutations. For a satisfactory definition of impossibility, it would be necessary to compress the entire law of contracts, which has been developing for hundreds of years, into one sentence. It is at this precise point that the average engineer stumbles between law as he recognizes it and law as the legal profession recognizes it. An engineer studies physics, chemistry, and other branches of science in which a law may be stated briefly, possibly by an algebraic equation, such as $F = ma$. This law of science is a relation between cause and effect which, so far as existing experience goes, has been proved valid in all cases.

Law, in the sense of public writings, is an entirely different thing. It is theoretically possible to present a short statement of law such as is found in the civil codes existing in many states. Applying the law is not as simple as the statement in the code would lead one to believe. It is necessary to take cognizance of, and to apply, the hundreds and thousands of qualifying statements located elsewhere in both organic and ordinary law, both written and unwritten. This explains the difficulty of presenting a precise definition of impossibility and the necessity for citing cases involving a specific point. The author should be commended for his work and analysis in bringing together these cases involving a certain principle applied to engineering work.

The paper should not lead any engineer to attempt to solve his own legal problems. There is a legal maxim to the effect that a man who is his own lawyer has a fool for a client. To a lawyer preparing a specific case, this summary of impossibility as related to engineering contracts may be valuable and time saving. Laws are so manifold that a lawyer can no more hope to be thoroughly informed on all branches of the law than an engineer can hope to be an expert in all the various specialized phases of engineering. Situations arise where the engineer may be better prepared to understand legal cases involving his specialty than the lawyer in general practice. This is one reason why it is desirable for the courts to work hand in hand with the engineer where legal problems of engineering are in conflict.

One important class of laws of the land consists of judicial decisions, whether classed officially as written or classed as unwritten if they have no certain repository. Most of the cases cited by the author regarding impossibility cover the past one hundred years or more. There is no reason to expect that a clear cut definition of impossibility will be developed, but that, under the legal system of the United States, the courts will continue for centuries to modify rules of law in their attempt to render justice. A fluid system of laws such as this seems desirable for effecting justice under changing conditions.

GEORGE J. SOFFER,⁵ JUN. ASCE.—A stimulating challenge to the engineer is presented by the author who emphasizes the necessity of the engineer's having some understanding of the law. The paper substantiates the theory that the engineer should have a liberal education. Many schools now require a course in law for undergraduate students.

In his article, however, Mr. Borg has included cases that apply to entirely different rules of law. For example, the case of *King versus Duluth* (65) was decided on the rule of consideration in contracts which states " * * * that a promise to do what one is already legally bound to do is not a consideration for the promise of another." (108)

Courts of law are provided to administer justice and also to settle inequities. Cases brought to trial represent situations in which the contracting parties cannot agree as to the terms of their contract. It seems that the duties of the engineer are (1) To avoid such disagreements by the wording of the original contract and (2) to negotiate with the parties in order to reach a compromise, since neither party recovers 100% after legal fees.

The law, written and unwritten, goes back many centuries. When a rule of law is followed for hundreds of years, it means that this law represents reason, logic, and justice. Excuse from a contract, because of impossibility of performance, is limited to: (a) Destruction of the subject matter; (b) death of a party in a personal service contract; (c) conditions essential to performance that do not exist; and (d) a change in the law. Such limitations can be appreciated because otherwise contracts would be broken at will by one party and would cause considerable damage to the other contracting party. However the law of contracts is profuse with rules, and when relief cannot be found under one particular rule, it may be sought under another. In such cases the lawyer's services are needed. The engineer cannot replace the lawyer, nor can the lawyer replace the engineer. Each one plays his part in society.

ABRAHAM M. ALOFF,⁶ ASSOC. M. ASCE.—One who undertakes to expound a legal topic to engineers runs the risk of treating his subject in a manner that is too obscure to be of value to engineers and too superficial to be of value to lawyers. The author has evidently attempted to avoid both these risks, and his paper is well worth the scrutiny of both professions. The fact that most of the references supporting his statements are to the original case reports rather than to treatises or law-review articles enhances the authoritativeness of the discussion from the lawyer's point of view. The engineer will appreciate the simplicity and absence of legal technicalities in the text.

The engineer-reader, however, should be cautioned that many of the rules set forth, although supported by actual decisions in one or more jurisdictions, are not necessarily of universal application. Thus a particular rule may have been modified or may not have been followed at all in a similar case in another state. What is even more frequent is that the rule governing a set of facts already adjudicated in states A, B and C may not have been announced in state D because such a case has not arisen there. In such a situation, the

⁵ Draftsman, Burns and Roe, Inc., New York, N.Y.

⁶ Examiner, Massachusetts Div. of Civ. Service, Boston, Mass.

lawyer must use his technical knowledge to predict the rule that state D will follow, a prediction that is sometimes extremely difficult to make. Thus the relative simplicity of the author's treatment, helpful as it is as a point of departure, should not mislead the reader into considering the rules as definitive for all states. As the author indicates, the rules may change even in a given jurisdiction over a period of time.

Of particular interest is the author's forecast as to the probable trend of practice in the future. In suggesting that the courts will be increasingly liberal in admitting the newer concepts of impossibility, the author is in accord with the weight of opinion. The jurist Roscoe Pound goes even further, expressing the opinion(109) that

"* * * belief in the obligatory force of contracts and respect for the given word are going, if not actually gone, in the law of today."

But instead of relying on such a broad generalization, contractors will be well advised to be guided by the principles set forth in the author's paper.

ROBERT F. BORG,⁷ Assoc. M. ASCE.—The several discussions reveal that an awareness of the problems dealt with in the paper exists in the profession. The writer is indeed indebted to Mr. Sacks for his perceptive comment on the holding that a contractor is liable when he agrees not only to produce a desired result but also to follow the plans and specifications. He is correct when he states that the decision in the Philadelphia Housing Authority case (56) rather than that in the Kuhs case (56) applies this principle. The Kuhs case applies the more liberal view set forth in the MacKnight case (52) which is to the contrary. The cases as cited in the Appendix (56) should be listed, therefore, in reverse order, with "contra" before the Kuhs case.

That the rule in the Philadelphia Housing Authority case is a harsh one, there can be no doubt. It is submitted that the decision of this case can be avoided if the engineer as the specification writer will be realistic about his requirements. To insist upon literal compliance and a guaranteed result, as Mr. Sacks states, is to invite a harsh application of law. Only incidentally might it be mentioned that a specification with such an onerous clause also invites higher construction costs because the contractor is certain to provide for such a contingency in his estimate.

In his extremely thoughtful discussion, Mr. Jackson raises the interesting question of legislative statutes or codes and their effect on decisions in the cases involving impossibility.

It was originally contemplated by the writer that the paper would include a section devoted to the treatment of impossibility in those jurisdictions governed by civil law. By definition, these jurisdictions would rule in particular cases on the basis of legislative statute rather than (as is the method followed in most states of the United States) on the basis of past decisions or common law. Space limitations prevented inclusion of the subject at the time.

Under the common law, a promise (as was stated at the beginning of the paper) is binding in accordance with its terms, even when it later proves to be impossible of performance, unless the promisor is able to exempt himself

⁷ New York, N. Y.

by proof that he falls within one of the recognized exceptions. The civil law, however, usually regards impossibility as an excuse unless the promisee is able to prove that the other party assumed the risk of impossibility. Strange to state, although the two systems of law appear to be at opposite poles, the decisions in actual cases do not vary greatly. Some of the jurisdictions governed by civil codes include: Louisiana in the United States, France, Italy, Spain, Portugal, The Netherlands, and Chile.

Thus, as Mr. Jackson states, although the civil law may attempt in a code to present a short statement of the law, applying the law after such a statement is at least as difficult as the system of common law. As was observed by Mr. Jackson, the common law is the more fluid of the two systems, and rules of law are thus modified over the years to render more effective justice.

This point is admirably stated by Mr. Aloff in his caution against using the cases decided in one jurisdiction as being the law at every other place. Indeed, on some points, the forty-eight state jurisdictions may be equally divided on their interpretation of the law. Moreover, there may be three, or perhaps four, different recognized rules for a particular point of law, each one of these rules having states adhering to them; but (as previously emphasized in connection with the civil law view of impossibility), although the rules may be diametrically opposed, the decision in a particular set of facts may be the same in the various jurisdictions.

The advice of Mr. Soffer appears to offer the soundest solution to this apparent paradox. The rules of contracts are many and technical. It remains for the lawyer and engineer to work together in providing the relief which is sought. When, as Mr. Soffer states, relief cannot be found under one particular rule, it may be sought in another. The writer is particularly indebted to Mr. Soffer for his reasoned discussion of adaptation of the rules of law toward giving the relief sought. He is quite correct, of course, in his comment on the King case (65).

The writer should have made it plain that it was the dicta in this case which gave rise to the comments about extra compensation. The words of the court were:

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit."

The fact that Laurence P. Simpson and Essel R. Dillavou saw fit to include the foregoing case in the section of their book (108) on "Consideration," rather than farther back under their treatment of "Impossibility," was no accident. The paragraph quoted, however, could just as well have come from any number of cases decided on the grounds of impossibility.

The duties of the engineer are succinctly stated by Mr. Soffer as (1) avoiding disputes by his wording of the original contract and (2) negotiating for a compromise. Stated in a few words, this is the key to the relationship of the engineer to the entire subject at hand.

Mr. Aloff's comments on the trend of the law and his quotation of Roscoe Pound (109) are extremely stimulating in their illustration of the dangers of carrying useful progression of the law to extremes. Mr. Pound can be more fully appreciated, however, when the sentence quoted is read together with those which immediately precede it (109):

"* * * Partly, French lawyers tell us, there is a moral idea here. Contracts might be improvident or changes in the economic situation might affect the value of the promised performance or of the given or promised equivalent. This is akin to an idea we see at work in the law of legal liability everywhere. It is a humanitarian idea of lifting or shifting burdens and losses so as to put them upon those better able to bear them. Belief in the obligatory force of contracts and respect for the given word are going, if not actually gone, in the law of today."

Elsewhere in the same article, however, Mr. Pound presents the solution to this difficult problem of achieving desirable checks and balances in modern society with these words (109a):

"* * * An organized profession does not seek to advance the money-making feature of professional activity. It seeks rather to make as effective as possible its primary character of a public service. An engineer may patent his inventions. A manufacturer may get legal protection for his trade secret. What a member of a profession invents or discovers as to the art of his profession is not his property. It is at the service of the public. A tradition of duty of the physician to the patient, to the medical profession and to the public, a tradition of the duty of the lawyer to the client, to the profession, to the court and to the public, authoritatively declared in codes of professional ethics, taught by precept and example, and made effective by an organized profession, makes for effective service to the public such as could not be had from individual practitioners not bred to the tradition and motivated as in a trade primarily if not solely by quest of pecuniary gain. * * *"

It is hoped that the paper will aid in opening the way for a unity of action between law and engineering on the problems of practice involving the technical difficulties presented.

Court Citations and References.—

- (52) MacKnight Flintic Stone Co. *vs.* City of New York, 160 N. Y. 72, 54 N.E. 661 at 663 (1899). (a) Filbert *vs.* Philadelphia, 181 Pa. 530, 37 A. 545 at 546 (1897).

- (56) *Kuhs vs. Flower City Tissue Mills Co.*, 104 Misc. 243, 171 N. Y. 688 (1918). Modified 189 App. Div. 539, 179 N. Y. 450 (1919). Contra, *Philadelphia Housing Authority vs. Turner Constr. Co.*, 343 Pa. 512, 23 A. (2d) 426 (1942).
- (65) *King vs. Duluth, M. & N. Ry. Co.*, 61 Minn. 482, 63 N.W. 1105 (1895).
- (108) "Law for Engineers and Architects," by Laurence P. Simpson and Essel R. Dillavou, West Publishing Co., St. Paul, Minn., 3d Ed., 1946, p. 77.
- (109) "Law in the Service State: Freedom *versus* Equality," by Roscoe Pound, *Journal*, American Bar Association, Vol. 36, No. 12, December, 1950, p. 1051. (a) p. 980.

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